

BEFORE  
THE PUBLIC SERVICE COMMISSION OF  
SOUTH CAROLINA

DOCKET NO. 2001-504-E - ORDER NO. 2002-167

MARCH 7, 2002

IN RE: Application of Cherokee Falls Development	)	ORDER GRANTING
Company, LLC for a Certificate of	)	MOTION IN LIMINE
Environmental Compatibility and Public	)	
Convenience and Necessity to Construct and	)	
Operate a Generating Plant in the Vicinity of	)	
Gaffney, SC and to be known as the Cherokee	)	
Clean Energy Center.	)	

This matter comes before the Public Service Commission of South Carolina (the Commission) by way of a Motion in Limine (Motion) filed by Cherokee Falls Development Company, LLC (Cherokee or the Company) on February 28, 2002.

On February 27, 2002, the Commission issued Order Number 2002-133 which addressed the Department of Health and Environmental Control's (DHEC) request for an extension of time to prefile testimony in this docket. The Commission addressed DHEC's Motion for an Extension of Time to prefile testimony at its regularly scheduled meeting on February 26, 2002, wherein the Commission granted DHEC an extension of time to prefile its testimony from February 25, 2002, until February 27, 2002. The Commission also instructed DHEC to file its prefiled testimony with the Commission by the close of business on February 27, 2002, and instructed DHEC to serve and place its testimony in the hands of all parties by the close of business on February 27, 2002. The Commission outlined its disposition of DHEC's Motion for Extension of Time to File in Order No. 2002-133.

When Cherokee did not receive a copy of DHEC's testimony on February 27, 2002, the Company filed its Motion with the Commission.<sup>1</sup> In its Motion, Cherokee asserts that it was not served with a copy of DHEC's testimony on February 27, 2002, nor did the Company receive any facsimile or electronic mail transmission of DHEC's testimony. The Company also argues that DHEC's failure to comply with the requirement of Order No. 2002-133 that its prefiled testimony be placed in the hands of all parties by the close of business on February 27, 2002, is a violation of the Commission Rules of Practice and Procedure and State law. Cherokee argues fervently that Commission Order No. 2002-133 informed DHEC that the Commission would not tolerate any further noncompliance of the law by DHEC. In Order No. 2002-133, the Commission addressed DHEC's inclusion of a false statement in its original Motion for Extension to File and DHEC's mode of serving the parties with its Motion for Extension to File. The Company believes that in light of the Commission's admonishment that further transgressions of Commission Rules and State law will not be tolerated, DHEC should be denied the right to present witnesses in this case. (Motion at page 2)

On March 1, 2002, DHEC filed a Return to Motion in Limine (Return). DHEC asserts that through inadvertence DHEC's testimony was served on opposing counsel by mail, rather than by personal delivery, or facsimile. DHEC argues, however, that disallowance of DHEC's testimony in the record by the Commission is an inappropriate sanction. DHEC asserts that the proposed prefiled testimony summarizes issues DHEC Staff anticipates will have to be determined through the permitting process (Return at

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<sup>1</sup> DHEC's Certificate of Service for its prefiled testimony indicates that it served all other parties via United States Mail.

page 2). Further, while DHEC admits that its failure to put copies of its prefiled testimony in the hands of all parties on February 27, 2002, is a violation of Order No. 2002-133, DHEC argues that the noncompliance by DHEC of Order No. 2002-133 was not deliberate.

After reviewing a copy of DHEC's Return, the Commission's General Counsel David Butler filed a Response to the Return (Response). Mr. Butler states in his Response that he telephoned DHEC's Legal Department shortly after the end of the Commission meeting on Tuesday, February 26, 2002, to relay to DHEC the Commission's new deadlines for the prefiling and serving of DHEC testimony in the instant docket. After being informed that DHEC attorney Sam Finklea was on military leave for two days, Mr. Butler telephoned DHEC attorney Mason Summers. According to the Response, Mr. Summers was known to General Counsel Butler as being an attorney who worked with Mr. Finklea. Thereafter, the Response states Mr. Butler informed Mr. Summers of the new Wednesday, February 27 end-of-business deadline for the prefiling and serving of DHEC testimony. Moreover, according to Mr. Butler, he specifically emphasized to Mr. Summers that the testimony had to be filed at the Commission and placed in the hands of the parties by the close of business on Wednesday, February 27. Mr. Summers was also informed, according to the Response, that DHEC could fax or e-mail its prefiled testimony to the parties by the close of business on February 27. The Response also states that DHEC had knowledge of the Commission's directives even if its testimony was filed and served before receipt of Order No. 2002-133.

Cherokee thereafter filed a Reply to Return to Motion in Limine (Reply). In the Reply the Company asserts that its Motion is based on DHEC's failure to adhere to the Commission's Rules of Practice and Procedure, which DHEC has not disputed. Further, Cherokee argues that the Commission should adhere to the terms of its Order No. 2002-133 and prohibit DHEC from presenting testimony in the instant docket. Additionally, Cherokee argues that testimony from DHEC is not required as DHEC is a statutory party of record and DHEC can cross-examine Cherokee's witnesses regarding the status of permits that are within DHEC's jurisdiction.

We have reviewed the pleadings regarding Cherokee's Motion in Limine, and we find that the Motion in Limine should be granted. In our Order No. 2002-133, we specifically stated that DHEC's prefiled testimony was to be served on and in the hands of all parties on February 27, 2002. Moreover, the Response filed by General Counsel Butler states that he contacted DHEC and informed Mr. Summers that DHEC's testimony was to be served on and in the hands of all parties on February 27, 2002. Therefore, we are convinced that DHEC had adequate notice of its obligation to serve and place in the hands of all parties its testimony on February 27, 2002. DHEC failed to comply with the Commission's directive and Order No. 2002-133 when DHEC's testimony was not placed in the hands of all parties on February 27, 2002. The Motion in Limine is hereby granted. DHEC will not be permitted to present any witnesses during the merits hearing scheduled for Monday, March 11, 2002. DHEC, of course, remains a statutory party in this case, and DHEC will be permitted to cross-examine witnesses during the course of the proceeding on Monday, March 11, 2002.

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This Order takes effect upon issuance and remains in effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

William Buckley

Chairman

ATTEST:

  
Executive Director

Executive Director

(SEAL)